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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Review of the Policy)
Implications of the)
Changing Video Marketplace)

MM Docket No. 91-221

To: The Commission

REPLY COMMENTS OF THE
NETWORK AFFILIATED STATIONS ALLIANCE

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SUMMARY

The Network Affiliated Stations Alliance was deeply disappointed when the Commission voted last week to resuscitate its long-dormant rulemaking proceeding considering the repeal or relaxation of the network-cable cross-ownership prohibition. Permitting the networks and the cable industry to combine their massive market power and exercise that control over local stations would undermine dangerously the core communications policy values of localism, diversity and public interest broadcasting. Although "safeguards" apparently will be considered, the Affiliates remain highly skeptical that truly adequate safeguards can be fashioned.

In their comments, one or more of the networks seeks repeal of virtually every restriction on the networks found in the Commission's rules and policies. Included in their attacks are the rules defining the network-affiliate relationship -- the rule guarding the affiliate's right to reject network programs, the rule preventing a network from demanding an immutable advance option on an affiliate's time, the rule preventing a network from penalizing an affiliate for broadcasting a program from another network, and the policy against compensation plans that "tie" unwanted programming to desirable programming to force affiliates to broadcast the former to receive the latter.

The Affiliates oppose the relaxation or repeal of these rules and policies. The rules governing the network-affiliate relationship safeguard a core value of the Communications Act that has not changed over time. Local stations, and not national networks, must determine how their communities of license should be served. Affiliates, not networks, are licensed to serve the public. Affiliates' discretion to determine how to best serve their communities should not be compromised by eliminating necessary safeguards in the Commission's rules and policies. The leverage networks hold over affiliates, as NASA demonstrated in its initial comments, remains powerful in today's marketplace. If, moreover, the Commission repeals or relaxes the panoply of structural regulations called into question in this proceeding, maintenance of the rules protecting the independence of affiliates will be all the more critical.

In any event, the networks are clearly incorrect in asserting that repeal of these rules and policies is somehow critical to the long-term survival of the networks and the network-affiliate distribution system. The networks' expenses for distribution through their affiliates are but a small part, something on the order of 5 percent, of the networks' total expenses. The networks' true problems lie with their (and local stations') imbalanced relationship with cable and with the archaic restrictions on their dealings with programmers (on whom they spend approximately 80 percent of

- iii -

their budgets). It is in these areas that the networks should be granted regulatory relief. To attempt to cure the networks' ailments through elimination of affiliate autonomy will require elimination of all that is unique in the network-affiliate system.

CONTENTS

Summary	i
I. REPEAL OR RELAXATION OF THE CABLE-NETWORK CROSS-OWNERSHIP RULE REMAINS A BAD IDEA	1
II. THE RULES GOVERNING THE NETWORK-AFFILIATE RELATIONSHIP SHOULD NOT BE FUNDAMENTALLY ALTERED	3
A. The Network-Affiliate Rules are Designed to Preserve the Ability of Local Stations to Fulfill Their Statutory Obligation to Serve Their Local Communities	5
B. The Networks' Attack on the Network-Affiliate Rules Is Misplaced	16
Certificate of Service	23

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REPLY COMMENTS OF THE
NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA" or the "Affiliates") hereby replies to the initial comments filed in this proceeding.

I. REPEAL OR RELAXATION OF THE CABLE-NETWORK
CROSS-OWNERSHIP RULE REMAINS A BAD IDEA.

In their comments, the Affiliates strongly implored the Commission to leave in place the existing cable-network cross-ownership rule. See NASA Comments at 9-40. Of the industry parties filing comments, essentially only those constrained by the rule, and indeed only some of those, urged repeal.^{1/} Joining in NASA's assessment that repeal or relaxation of the rule is simply a bad idea were broadcast associations representing all types of broadcast stations, as

^{1/} See Comments of Capital Cities/ABC, Inc. ("ABC") at 10; Comments of the National Broadcasting Company, Inc. ("NBC") at 45; Comments of the National Cable Television Association ("NCTA") at 11. By contrast, CBS, Inc. ("CBS"), though attacking virtually every other network rule, makes no mention of the cable-network restriction. Other than the networks and cable operators, only Group One Broadcasting, an ABC affiliate in Akron, Ohio, and the Freedom of Expression Foundation supported repeal.

well as program producers.^{2/} These parties joined the Affiliates in urging the Commission promptly and definitively to end its nine-year-old rulemaking proceeding, MM Docket No. 82-334, looking toward repeal or modification of the cable-network cross-ownership prohibition.

The Affiliates were, then, deeply disappointed when the Commission, even before receiving reply comments in this proceeding, voted to revive the dormant cable-network rulemaking by issuing a Further Notice of Proposed Rulemaking. See FCC Report No. DC-2015 (December 12, 1991). As the Affiliates demonstrated in their initial comments, it is simply perverse, in this era of unprecedented cable power that is a matter of Commission record,^{3/} to contemplate granting cable systems additional leverage over local stations. Moreover, whatever decline in market power may have been sustained by the networks in certain contexts, there is no evidence, nor any reason to believe, that the undeniable clout

^{2/} See Comments of the National Association of Broadcasters ("NAB") at 36-43; Comments of the Motion Picture Association of America ("MPAA") at 18-21; Comments of the Association of Independent Television Stations ("INTV") at 18-23; Comments of Fisher Broadcasting at 6-13.

^{3/} Cable market power has been the subject of repeated Commission findings in the past three years. See, e.g., Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd. 4962, 4972-74 (1990) (cable holds "market power" in the home video market); Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 6 F.C.C. Rcd. 4545 (1991); Compulsory Copyright License for Cable Retransmission (Report to Congress), 4 F.C.C. Rcd. 6562 (1989).

the networks have had with their affiliates has in any way diminished. The unrestrained combination of broadcast networks and local cable operators is all but certain to result in suppression of competition and diversity in the local video marketplace.

Though the text of the Further Notice has not yet been published, it appears from the press release that the Further Notice will acknowledge the genuine and substantial dangers to competition and diversity posed by repeal. The Further Notice apparently will propose certain "safeguards" intended to ameliorate these dangers. The Affiliates, as they noted in their initial comments, remain highly skeptical that adequate pro-competitive "safeguards" can be fashioned (or, more precisely, that truly adequate safeguards would satisfy the expansionist objectives of the networks). Nevertheless, the Affiliates intend to participate vigorously and conscientiously in the cable-network proceeding.

II. THE RULES GOVERNING THE NETWORK-AFFILIATE
RELATIONSHIP SHOULD NOT BE FUNDAMENTALLY ALTERED.

In their comments, one or more of the broadcast networks (which includes, for these purposes, the Fox Broadcasting Company) attacks virtually every Commission rule or policy restricting the networks. The networks allege that all of the network rules have been overtaken by the recent

transformation of the video marketplace and have been reduced to pointless and even counterproductive "inefficiencies."^{4/}

As to certain of these rules, such as the "dual network" rule^{5/} and, of course, the financial interest and syndication rules,^{6/} the Affiliates, too, believe that reexamination is in order. The Affiliates and networks part company, however, with respect to the Commission's rules and policies governing the network-affiliate relationship. These rules and policies continue to fulfill the vital purpose of protecting affiliates from undue network leverage and, in doing so, promote local service, diversity and competition.

A. The Network-Affiliate Rules are Designed to Preserve the Ability of Local Stations to Fulfill Their Statutory Obligation to Serve Their Local Communities.

As chronicled in the Affiliates' initial comments, the value of the network-affiliate relationship to the American people derives from its unique ability to maximize

^{4/} See, e.g., ABC Comments at 38 ("[t]he flexibility of networks and affiliates to arrive at the arrangements that will best enable them to meet their competitive challenges should not be constrained by regulation which is not imposed on their competitors"); Comments of CBS, Inc. 33; NBC Comments at 64; Comments of Fox Broadcasting Co. ("Fox") at 12-13.

^{5/} The "dual network" rule, 47 C.F.R. § 73.658(g) (1990), essentially prohibits broadcast television stations from affiliating with any network organization that maintains more than one broadcast network.

^{6/} See Evaluation of the Syndication and Financial Interest Rules, 6 F.C.C. Rcd. 3094 (1991), rec. denied, FCC 91-336 (Oct. 24, 1991).

the core communications policy values of diversity, localism and public interest programming. NASA Comments at 2-4. This ability, in turn, is critically dependent upon the integrity of the network-affiliate relationship, a relationship which combines the "efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public." H. Rep. No. 100-887, 100th Cong., 2d Sess 20 (1988) (emphasis added).

The Commission has jealously guarded this critical "decentralization of control." A primary means of doing so has been rules and policies designed to protect the independent programming judgements of local stations. Among these are the "right to reject rule,"^{7/} the "option time" rule,^{8/} and the "exclusive affiliation" rule.^{9/} A necessary corollary to these rules is the Commission's long-standing

^{7/} The "right to reject" rule, 47 C.F.R. § 73.658(e) (1990), prohibits a network from "preventing" or "hindering" an affiliate from "[r]ejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest" or "[s]ubstituting a program which, in the station's opinion, is of greater local or national importance."

^{8/} The "option time" rule, 47 C.F.R. § 73.658(d) (1990), prohibits a network from "optioning" an affiliate's time or engaging in practices that have "the same restraining effect as time optioning."

^{9/} The "exclusive affiliation" rule, 47 C.F.R. § 73.658(a) (1990), prohibits a network from "preventing" or "hindering" an affiliate from, or penalizing an affiliate for, "broadcasting the programs of any other network organization."

prohibition on overreaching "incentive compensation plans."^{10/}

The networks concede the continuing validity of the core principle that affiliates must have the right to reject network programming they find unsuitable to maintain essential responsibility for the programming they broadcast.^{11/} Accordingly, none of the networks seek complete repeal of all of the rules protecting the independence of affiliates. Instead, each of the networks advocates repeal or relaxation of selected specific rules or policies.^{12/}

^{10/} See Columbia Broadcasting System, Inc., 22 R.R. 265, 270 (1961); Application of Section 3.658(a) of the Commission's Rules, 23 R.R. 769, 780 (1962).

^{11/} See, e.g., ABC Comments at 40 ("the public interest basis for the 'right to reject' rule is unaffected by the radical change in the marketplace"). Although Fox makes a general suggestion that all of the "substantive terms" of the network-affiliate relationship should be open to negotiation, it does not make a specific argument in favor of repealing the right to reject rule. See Fox Comments at 13.

^{12/} CBS also proposes relaxation of the prime time access rule ("PTAR"), 47 C.F.R. § 73.658(k) (1990), to permit network affiliates to carry "off-network" programming in "access" time. See CBS Comments at 56. The Affiliates continue to believe that PTAR serves a useful purpose in providing an assured prime-time outlet for the exercise of local programming determinations. See Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382, 397, rec. denied, 25 F.C.C.2d 318 (1970). Although the Affiliates take no position at this time on the narrower CBS "off-network" proposal, they note that alteration of the other network-affiliate rules at issue would increase the dangers of network abuse that might flow from such a step. Cf. ABC Comments at 42 (need for option time rule is reduced by existence of PTAR).

The rules governing the network-affiliate relationship cannot, however, continue effectively to serve this interest if the body of the rules is subjected to piecemeal dismemberment. The network-affiliate regulations, "as well as the network practices at which they are aimed, are interrelated." National Broadcasting Co. v. United States, 319 U.S. 190, 196-97 (1943); see Report on Chain Broadcasting 75 (Docket 5060, May 1941) ("Chain Broadcasting Report") ("the various [network] practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly").^{13/}

A brief review of the history of these rules reveals that they were intended and have had the effect of preserving the essential freedom and responsibility of affiliates to

^{13/} ABC and Fox also seek repeal of the "territorial exclusivity" rule, 47 C.F.R. § 73.658(b) (1990), which prohibits networks and affiliates from contracting for exclusivity beyond the affiliates' communities of license. The rule constrains local stations as well as networks and impacts the autonomous programming ability of local stations to a lesser degree than other rules governing the network-affiliate relationship. Whatever one's view of the need for the rule or the soundness of the rule's rationale at the time it was adopted, the Commission should be aware that hundreds of stations have been built, purchased and operated in reliance upon it. There are many markets in which smaller affiliates are "overshadowed" by larger stations which, in concert with the networks, might succeed in depriving the smaller station of its affiliation. Because of the importance of maintaining effective local programming voices in the overshadowed communities, not to mention the many millions of dollars at stake, any alteration of this rule should be approached with extreme caution.

broadcast programming that the affiliates -- and not the networks -- decide is appropriate for their communities of license.^{14/}

The Right to Reject. The "right to reject" rule is the centerpiece of the network-affiliate regulatory scheme. That rule provides that networks cannot, by contract or otherwise, "prevent" or "hinder" network affiliates from

^{14/} The integrity of this structure is critical to the Commission's ability to regulate the broadcasting industry:

These regulations were promulgated to ensure that the licensees of radio stations who become affiliated with the various networks did not, formally or informally, surrender control of the day-to-day operation of their stations to the networks. Licensee responsibility is an integral part of the statutory scheme for regulating the radio industry. . . . The Communications Act makes the individual licensee responsible for the operation of his station and requires that he maintain control of that operation in order to carry out the proposals made to the Commission. Unless the licensee retains complete control of his station, the Commission has no one whom it can hold responsible for the operation of the station and the Commission's statutory duty to ensure that broadcast licensees operate their stations in the public interest would be effectively frustrated.

Don Lee Broadcasting System, 5 R.R. 1179, 1198 (1950), quoted in Network Broadcasting: Report of the Network Study Staff, H. Rep. No. 1297, 85th Cong., 2d Sess. 142-43 (1958). As the networks recognize, changes in the video marketplace have not altered this essential obligation. See ABC Comments at 40. This bedrock obligation has been a constant throughout various changes in regulatory approach and will remain so into the future. See Report and Order, Deregulation of Commercial Television Stations, 98 F.C.C.2d 1076, 56 R.R.2d 1005 (1984); First Report & Order, Deregulation of Radio, 84 F.C.C.2d 968, 977-83, 49 R.R.2d 1 (1981), aff'd in part, rev'd in part on other grounds sub nom. Office of Communications of the United Church of Christ v. Federal Communications Comm'n, 707 F.2d 1413 (D.C. Cir. 1983).

rejecting network programming that the licensee finds to be unsatisfactory or contrary to the public interest or from substituting for network programming any "program which, in the station's opinion, is of greater local or national importance."^{15/}

Before the rule's adoption, the NBC and CBS networks employed onerous contractual provisions requiring any affiliate rejecting a program to "be able to support his contention that what he has done has been more in the public interest than had he carried the network program." Nat'l Broadcasting Co., 319 U.S. at 204. The Commission found that an affiliate cannot permissibly be required by a network to prove the public interest superiority of a judgment rejecting network programming:

It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer control of his station directly to the network. . . . He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.

Chain Broadcasting Report 66. The Commission noted that "these are principles of general application based on sections 301, 309, and 310 of the Communications Act." Id.; see also

^{15/} 47 C.F.R. § 73.658(e) (1990).

Network Broadcasting: Report of the Network Study Staff to the Network Study Committee, H. Rep. No. 1297, 85th Cong., 2d Sess. 125 (1958) ("Barrow Report") ("main thrust" of rules is to "assure the local licensee greater freedom of action in programming for the needs of his particular community than the highly exclusive and limiting arrangements with networks permitted prior to the adoption of the rules").

Perhaps in recognition of the statutory nature of this rule, none of the networks has expressly sought its repeal. The right to reject rule, however, standing alone, cannot ensure that licensees are fully protected in carrying out their statutory obligations. To preclude subversion of the rule, the Commission has crafted several related provisions that serve the same core values as the right to reject rule. These complementary rules -- the prohibitions against "option time," "exclusive affiliation," and overreaching "incentive compensation" plans -- form an integrated whole that preserves the freedom of the affiliate to serve its community of license. None of these rules can be eliminated or substantially diluted without endangering affiliates' ability to meet the needs of the public they are licensed to serve.

The Option Time Prohibition. The "option time" prohibition generally provides that a network cannot require affiliates to set aside "option time" for the network -- time

the network has a unilateral option to program, on short notice, regardless of any contrary plans of the affiliate.^{16/}

Prior to the prohibition on option time, a network could require an affiliate to clear time set aside for the network even though programs from other sources were displaced. "The station's power to reject network programs during option time was, for all practical purposes, severely limited. . . . This, in turn, adversely affected the affiliate's ability to construct a balanced programming schedule responsive to the needs and interests of the local community." Barrow Report 132. The Commission found that such practices suffer from the same infirmities as encroachments on an affiliate's right to reject programming:

By restricting the licensee's freedom of choice, the option-time practice represents, accordingly, an abdication of his duty to program his station as he deems most in the public interest, not only as to what programs to present but at what times to present them. In view of this, we would reach the same result even if option time were not anticompetitive in effect -- i.e., if there were no claims by other program sources or non-network advertisers that they are excluded from the hours involved -- since no advantage to the public interest appears to accrue. . . . [W]ith removal of the option-time "shield," programs will fall or stand on their own merits, without artificial protection on the one hand or exclusion on the other.^{17/}

^{16/} 47 C.F.R. § 73.658(d) (1990). The ABC, NBC and Fox networks advocate repeal of the rule.

^{17/} Amendment of Section 3.658(d) and (3) of the Commission's Rules to Modify Option Time and the Station's Right to Reject Network Programs, 34 F.C.C. 1103, 1128 (1963) ("Option Time Order"). Option time initially was prohibited

Unrestricted network "options" had, then, become a means by which the networks could evade the right to reject. The option time rule was necessary to restore that ability.

Exclusive Affiliation. The "exclusive affiliation" prohibition prevents networks from "preventing" or "hindering" affiliates from "broadcasting the programs of any other network organization."^{18/} This rule, like the option time rule, is a necessary complement to the right to reject rule:

The important consideration is that [without such a rule] station licensees are denied freedom to choose the programs which they believe best suited for their needs; in this manner the duty of station licensees to operate in the public interest is defeated. . . . A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable. . . .

Chain Broadcasting Report 52, 57; see also Barrow Report 133.

in the Chain Broadcasting Report, but a supplemental report five months later permitted option time subject to certain procedural protections. See Supplemental Report on Chain Broadcasting 8-13 (October 11, 1941). In 1959, the Antitrust Division of the Department of Justice found that option time practices violated the antitrust laws as "exclusive dealing arrangements" and "illegal tying arrangements." Applicability of Antitrust Laws to Option Time Practices, 18 R.R. 1801, 1805-07 (1959). Notwithstanding this infirmity, CBS persisted in claiming that option time was "a shield against natural economic forces which would otherwise threaten the destruction of networking." Option Time Order, 34 F.C.C. at 1111. The Commission did not agree that option time was essential to networking and prohibited it, finding that "[i]t would be highly inappropriate to give the networks what amounts to a limited monopoly in order simply to maintain and increase their revenues." Id. at 1124.

^{18/} 47 C.F.R. § 73.658(a) (1991). The ABC and Fox networks support repeal of the rule.

"Incentive Compensation" Plans. The Commission has derived from the exclusive affiliation prohibition, the principle that networks cannot bind their affiliates to compensation plans that unduly penalize affiliates for broadcasting non-network programming. See Columbia Broadcasting System, Inc., 22 R.R. 265, 270 (1961); Application of Section 3.658(a) of the Commission's Rules, 23 R.R. 769, 780 (1962). CBS expends a significant portion of its comments asking the Commission to "overrule" these decisions and to permit networks to provide "reasonable" financial incentives for clearances. See CBS Comments at 32-55. CBS's own description of the plans at issue in these cases should demonstrate both that these decisions should not be overruled and that, in any event, they need not be in order to enable the network to adopt "reasonable" incentive plans.

The incentive plans struck down by the Commission essentially "tied" the network's less desired programming to that of its more desired programming. Under the plan, the network paid compensation at a low level (e.g., 10 percent of the station's rate) up to a certain number of hours of clearances and then raised the rate dramatically (to, e.g., 60 percent) for each remaining hour cleared. The number of hours at the cut-off point was calculated to match the number of "indispensable" hours the network provided. Because no affiliate could afford to totally abandon these programs, the obvious and expressly intended effect was to force the station

to take the less desired programming in order to achieve a competitive compensation rate for the entire package.

The Commission found that the compensation scheme "hindered" stations from clearing "other network and non-network programs" and was a violation of the exclusive affiliation rule. 23 R.R. at 780. As CBS points out, the Commission was focused on fostering diversity at a time when there were many fewer outlets for competitive network and non-network programming. It is also true, however, that the CBS plan was directly analogous to "block booking" or "tying" schemes, which have repeatedly been found to be anticompetitive.^{19/} Lopsided "incentive" plans requiring affiliates to accept undesired (and, perhaps, undesirable) programming in order to acquire the network programming for which they have bargained and which their audiences expect are flatly antithetic to the public interest. Permitting the networks to exploit the financial tensions that the networks concede are facing many stations in today's marketplace by

^{19/} See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156 (1948) ("[w]here a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. . . . the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have"). This principle has been consistently applied to distribution of programming to television stations. See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (block booking of films for television violated Sherman Act); see generally *Outlet Communications, Inc. v. King World Productions, Inc.*, 685 F. Supp. 1570 (M.D. Fla. 1988); *Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co.*, 611 F. Supp. 415 (C.D. Cal. 1985).

reinstating "incentive" compensation plans would be inimical to the spirit of this inquiry.^{20/}

It is also worth observing that the Commission has not held, as CBS implies, that all compensation schemes must be totally "flat," compensating equally all dayparts or all programs within a daypart. See Application of Section 3.658(a), 23 R.R. at 780 ("we wish to point out that at this time we do not regard all incentive plans as necessarily violating our rules, or as contrary to the public interest"). All that the Commission has said is that incentive schemes cannot be so skewed as to unfairly employ the networks' leverage through the unique market power of their most popular programming to suppress the local stations' ability to exercise their independent programming judgement. The kind of two-tiered "tying" schemes promoted by CBS clearly had that effect.

* * * * *

The interrelatedness of these rules and policies should be evident from the foregoing discussion. All are designed to protect the "right to reject," the right of the local station to program in the best interests of its local community. If networks were permitted to "option" station

^{20/} See NBC Comments at 40-41 (noting "pronounced downward trend" in station's financial condition; "[m]any stations in small markets are currently in a loss position"); see also id. at 38 ("[p]articularly in small markets, network compensation is a critical element of station profitability"); see also Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, 6 F.C.C. Rcd. 3996, 4025-26 (1991).

time without restriction or were permitted to implement lopsided incentive compensation plans that "tie" network programs to one another, the right to reject would indeed be a hollow formality.

The importance of protecting this core value is also emphasized by the fact that the Commission has called into question virtually all of the other structural regulations governing broadcasting. To the extent that the broadcasting system in general, and the network component in particular, becomes more concentrated through relaxation or repeal of, for example, the multiple and cross-ownership rules, the right to reject rule and its complementary rules become all the more important to continued realization of the benefits of diversity and decentralization of the network-affiliate partnership. Should the Commission remove or relax the network-cable cross-ownership prohibition, moreover, the maintenance of the network-affiliate rules will be crucial.

B. The Networks' Attack on the Network-Affiliate Rules Is Misplaced.

None of the networks address adequately the issue of whether the network-affiliate rules continue to fulfill their initial purposes and whether they remain necessary as a check on the national power of the networks over their affiliates. Rather, the networks simply incant the message that the video marketplace is substantially more competitive and assert repeatedly that these types of "inefficiencies" are luxuries

of a by-gone era which cannot be tolerated if the networks are to survive.

The networks are wrong on both counts. First, the rules remain necessary to check network power over their affiliates. In their comments, the Affiliates demonstrated that, notwithstanding the unquestioned sea changes in the video marketplace, the relative bargaining power of the networks and the affiliates has not been fundamentally altered. See NASA Comments at 16-21. Very few of the changes in the market have had a direct impact on the network-affiliate relationship, and those that have (e.g., the addition of a fourth "network" and a vast increase in the number of stations) on balance have not served to bolster the bargaining strength of local stations. There is simply no reason to believe that, without the protections of the network-affiliate rules, the affiliates will not be subjected to the same kinds and degree of pressure on programming issues that prompted the initial adoption of the rules.

Without evidence of a material shift in bargaining power, the networks are left with the argument that repeal of the rules is essential to their survival. Here, again, the record is virtually devoid of any evidence to substantiate this claim. For the most part the networks rely solely on

gross aggregated data which show that, on balance, they are neither as profitable nor as efficient as cable networks.^{21/}

But the single most important "inefficiency," as CBS at least acknowledges, is the lack of cable's "second revenue stream" -- subscriber income. See CBS Comments at 78-79. The source of this "inefficiency" is not the network-affiliate structure but the cable compulsory license, and the cure is retransmission consent. See NASA Comments at 6.

In fact, there is strong reason to believe that the practices at issue play but a small part in the determination of network profitability, a far smaller part than, for example, the programming practices constrained by the financial interest and syndication rules. At core, the networks' complaint is that the affiliates clear too little of their programming. The only network to offer any numbers, CBS, asserts that the affiliates preempted 5,299 hours of prime time programming last year, 7.9 percent of that for news

^{21/} Similarly, the networks' claims that the rules should be repealed merely because the radio network rules largely were repealed when the field of radio networks became less concentrated miss the mark entirely. See, e.g., ABC Comments at 37. The networks fail to point out that a primary determinant of the Commission's decision to eliminate several of the radio networking rules was the fact that a mere 3 percent of radio revenues were represented by network profits and the majority of radio networks provided programming segments of five minutes or less to their affiliates. See Report, Statement of Policy and Order, 63 F.C.C.2d 674, 676-78 (1977). Quite clearly, the dominance of the television networks has not diminished to near that of the radio networks at the point at which radio network rules were repealed.

and public affairs programming and some additional amount for public affairs specials. CBS Comments at 43.

But the CBS network fed more than 250,000 hours of prime time programming to its affiliates last year.^{22/} Thus, the total preemptions in prime time were on the order of 2 percent of total prime time programming offered, even less for programming that was neither news nor public affairs.^{23/}

The networks imply that all of the non-news preemptions were solely to enhance local station revenues and, furthermore, because some of the preempted programs were more highly rated, were undertaken at the expense of the stations' local viewers. As noted earlier, CBS attributes this fact to the artificially "flat" compensation schemes imposed by Commission policy. See CBS Comments at 41-42.

To begin with, there is reason to question whether gross ratings points should be the sole determinant of the public interest. Just as news and public affairs programming is not per se less in the public interest because it draws smaller audiences, some of the programming run by local stations that is not quite as popular as network programming

^{22/} An approximate average of 22 hours of programming per week, multiplied by 52 weeks per year by approximately 220 affiliates yields a total of 251,680 hours.

^{23/} By comparison, in 1959-1962, it appears that preemptions (by dollar volume) were on the order of 4-6 percent. See Application of Section 3.658 of the Commission's Rules, 23 R.R. 769, 776 (1962).

may nonetheless, in the judgment of that local station, be of greater public importance in that community.

In any event, even if the networks are correct, these programming decisions presumably could be reversed by the simple expedient of increasing the compensation to affiliates. And, contrary to the networks' implication, the numbers necessary to achieve these goals are likely not large. Total station compensation at each network comprises somewhere on the order of 5-6 percent of their total budgets. Programming costs, by contrast, are on the order of 80 percent of the networks' total budgets.^{24/} It is, frankly, hard to believe that the networks could not protect these enormous programming investments with relatively small compensation investments if, as CBS alleges, every tenth of a rating point is "vital." See CBS Comments at 41.

These relative expenditures also should serve to underline the Affiliates' position that it is far more likely that the appropriate assistance for the networks and for the network-affiliate system can and should be found through reform of the networks' relationships with their program

^{24/} Network compensation at each of the three major networks is in the \$100-125 million range. See, e.g., ABC Cuts Affiliate Compensation, Broadcasting, August 19, 1991, at 41. Programming expenses dwarf this comparatively minor amount. "Network program expenditures are estimated at \$9.4 billion in 1990 and projected to be \$12.2 billion in 1995." Broadcast Television in a Multichannel Marketplace, 6 F.C.C. Rcd. 3996, 4092-93 (1991); see also NBC Comments at 34 ("news, sports and entertainment programming represent by far [the] largest dollar commitment" of networks).